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No. 87-178

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PACIFIC GAS & ELECTRIC COMPANY,
a California Corporation
Petitioner,

VS.

PUBLIC UTILITIES COMMISSION
of the
State of California,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a state public utilities commission's interpretation of the terms of contracts, negotiated and approved more than three years earlier under the Public Utility Regulatory Policies Act of 1978 and the Federal Rules promulgated thereunder, raise a federal issue under the Act?

2. Do a state public utilities commission's decisions interpreting contract terms set to equal avoided cost pricing as provided under the Public Utility Regulatory Policies Act of 1978 and the Federal Rules promulgated thereunder, raise a federal issue as to whether the Act permits setting prices above avoided cost?

3. Do a state public utilities commission's decisions interpreting contract terms raise a federal issue under the Public Utility Regulatory Policies Act of 1978, where the state supreme court has decided, on the merits of the case presented, that the attack on these decisions is really a collateral attack on decisions issued three years earlier, and is therefore precluded by statute and precedent?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Public Utilities Commission of California (Commission) respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the judgment of the California Supreme Court denying, without opinion, Petitioner Pacific Gas & Electric Company's (PG&E) petition for writ of review from three Commission decisions.

I
STATEMENT OF THE CASE

A. Overview

This case concerns the Commission's interpretation of an ambiguity in contracts between certain electric utilities (including PG&E) and nonutility electricity-generating qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C.A. §§ 796 *et seq.*) and implementing regulations (18 C.F.R. Part 292).[1] The contracts are based on an offer standardized by the Commission pursuant to the requirements of PURPA and state law. The basic Commission-authorized agreement, known as interim Standard Offer 4 (interim SO4), implements PURPA provisions that require the respective utilities to buy QF-generated electricity.

Each utility offered its own version of interim SO4 as approved by the Commission. The specific terms at issue here pertained to all offers, but PG&E is the only utility which has had to be ordered to comply with its own agreement. The Commission reasonably interpreted the agreement, consistent with the agreement's purposes and the intent of the parties, as is made clear in the Commission decisions that originally approved the agreement and directed its development.

PG&E petitioned the California Supreme Court for review of the Commission's interpretation of interim SO4, as set forth in Decision (D.) 86-10-038 and modified in D.86-12-013 and D.86-

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[1] Congress enacted PURPA in order to encourage the development of alternative energy sources, thus reducing the country's dependence on fossil fuels; Congress found legislation necessary because electric utilities were reluctant to deal with alternative generators such as QFs. *FERC v. Mississippi* (1982) 456 U.S. 742, 750. In 1976, the California Legislature had passed the Private Energy Producers Act, Public Utilities Code §§ 2801 *et seq.*, in which the Legislature declared it "desirable and necessary" to require utilities to transmit QF power under certain conditions, in order "to encourage private energy producers to competitively develop independent sources of natural gas and electric energy not otherwise available. . . ." California Public Utilities Code § 2801.

12-104 on file herein as Appendices F, G, and H to PG&E's Petition for Writ of Certiorari (Petition). The California Supreme Court denied review, and PG&E filed its Petition with this Court.

B. History of the Development of Interim SO4

On January 21, 1982, the Commission issued D.82-01-103, 8 CPUC 2d 20, establishing guidelines for electricity sales from QFs to utilities. A primary guideline was "avoided cost," *i.e.*, the price paid to QFs was to approximate, as nearly as possible, the cost to the purchasing utility of obtaining an equivalent amount of energy and generation capacity from another source. Although the Federal Energy Regulatory Commission (FERC) regulations (FERC Rules) promulgated to implement PURPA authorize states to order utilities to pay more than avoided cost,[2] the Commission chose avoided cost as the standard to be applied in California. D.82-01-103 ordered utilities to file a series of standard offers, one of which was to be based on long-run resource plans. The latter, Standard Offer 4 (SO4),[3] was more complex than the others in its pricing provisions, payment options, *etc.*, and

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[2] The Preamble to the FERC Rules sets avoided cost as the price floor, saying: "While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of [QF] technologies. *However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement of these technologies, and must yield to federal Law.*" Preamble to the FERC Rules, 45 Fed. Reg. 12214, 12221 [emphasis added]. The New York State Court of Appeals held, on the basis of this language, that PURPA does not preempt state regulation requiring utilities to pay more than avoided cost for QF power. *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York* (1984) 63 N.Y.2d 424, *appeal dismissed*, 470 U.S. 1075 (1985).

[3] Originally it was thought that there might be five standard offers, and the one at issue was referred to as "Standard Offer No. 5" in some of the earlier decisions cited. For clarity, we will refer to it throughout this filing as SO4.

D.82-01-103 ordered utilities to make detailed proposals for its development.

The Commission found the first proposals submitted for SO4 unsatisfactory and unworkable, and asked the parties to define issues and alternatives, and to comment on each other's submittals. On November 18, 1982, it issued its *Report and Request for Comments,* outlining issues surrounding SO4 and proposing a framework for its development. The comments were received by January 31, 1983, and from them the Commission derived its approach to SO4. This approach is set forth in D.83-05-038, issued May 4, 1983 (Appendix hereto.).

According to D.83-05-038, there was a broad consensus among the utilities, reflected in their comments, "about the need to achieve the underlying purpose" of SO4, "which is to provide greater price certainty and to value the small power producers' facilities consistently with utility resources." (Appendix, p. A-3.) The decision illustrates this consensus with a quote from the comments of PG&E:

> It has become apparent that the currently available standard offers do not meet the needs of all QFs. One of the major reasons for this is the high degree of price uncertainty in these offers which adversely affects the ability of some projects to obtain financing. . . . A well designed standard offer, which mitigates the uncertainty, is consistent with avoided cost principles, and balances ratepayer and QF risk would also be desirable.

(*Ibid.*)

The Commission found that the various approaches proposed by the parties would require long hearings and a Commission-determined SO4, and that "[i]t is evident that there are many possible standard offers which could be developed that are consistent with avoided cost pricing principles." (*Id.*, p. A-6.) The difficulty of predicting avoided cost through evidentiary hearings, even in the short term, was compounded by the instability of fuel

costs. (D.83-09-054, App. B to Petition, p. A-4).[4] Thus it might be years before a final SO4 could be developed through evidentiary hearings.

The Commission was concerned that, without an SO4 based on long-run avoided costs, the pressure for nonstandard contracts might increase as market volatility made it harder for QFs to finance Standard Offer contracts based on short-run avoided cost. "Also," the Commission said, "the long-term value of new QF capacity in the utilities' resource plans is not fully reflected by the existing standard offers which base prices on fluctuating short-run avoided utility cost (see D.82-01-103, p. 67). It is, then, in everyone's interest that a standard offer based on long-run avoided cost be adopted." (App. B to Petition, p. A-5)

Therefore the Commission held a negotiating conference so that the parties could work together to build a methodology for an interim long-run Standard Offer, convinced that, "with the mutual objective of a timely decision in mind, parties can reach an accord." (Appendix, p. A-6.) The interim SO4 would be used until a final SO4 could be developed through evidentiary hearings. The Commission believed that negotiations including all parties would result in a price that fairly approximated avoided cost, because utilities would not agree to terms in excess of their projected avoided cost, and QFs would not agree to terms below that. If PG&E had not accepted this direction, both as to

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[4] The decision anticipated the current dispute and resolved it, saying that "[s]ome may contend that prices fixed under long-term forecasts can, at least at times, be above actual avoided costs, and therefore both: (1) PURPA will be violated in that payments will exceed avoided costs, and (2) the ratepayers will pay too much. We think the proper view and test is whether over the course of a long-term contract, despite periodic swings in actual avoided costs both above and below a forecast, the prices reasonably compensate QFs for their value in avoiding a utility's costs, and keep the ratepayer economically indifferent to whether the generation was performed by the utility or a QF. *As long as there is equal likelihood that swings in actual avoided costs are both below and above the forecast, over the term of forecast based prices, we think the spirit and letter of PURPA are followed.*" D.83-09-054, App. B to Petition, p. A-6 [emphasis added].

methodology and as to result, it could have filed a timely application for rehearing of D.83-05-038.[5]

The negotiating conference was held from May 23 to June 24, 1983. At a second conference (July 22, 1983), the parties "indicate[d] whether the proposed standard offers should be allowed to go into effect by this Commission pending evidentiary hearings on the multitude of issues surrounding pricing QF power." (D.83-09-054, App. B to Petition, p. A-8.) The results of the negotiations were set forth in D.83-09-054, which authorized utiltities to make interim SO4 available to QFs. That offer includes the price tables which are at issue here. (See Appendix B to Petition.)[6]

These tables were meant to provide the price certainty which all parties had agreed was "the underlying purpose" of the

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[5] California Public Utilities Code § 1731 provides, among other things, that no cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance of the decision. Cal. Pub. Util. Code § 1731. Section 1756 of the California Public Utilities Code provides that, to be timely, a petition for writ of review of a Commission decision must be filed with the California Supreme Court within 30 days of denial of rehearing, or within 30 days of the issuance of the decision on rehearing, if rehearing is granted. Cal. Pub. Util. Code § 1756. Under these provisions, PG&E has failed to raise any PURPA issue connected with D.83-05-038 or D.83-09-054 in a timely manner.

[6] Two types of payment are involved in utility purchases of QF power. One is the energy payment, which reflects the utility's variable costs (the most prominent of which is fuel) of generating each unit of electrical energy. Capacity payments reflect the reliability value to a utility system of having the potential generation of the QF's power plant available at any given time. In the methodology adopted by the Commission, capacity prices are based on the utility's cost of getting the same amount of equivalent capacity by building a combustion turbine (CT). The prices in question here relate to firm capacity (the amount of capacity a QF can guarantee), as-available capacity (unguaranteed capacity), and energy.

negotiating conference. They depend on a capacity pricing method which had been used for other Standard Offers, and energy prices based on projections of short-run marginal costs.[7] No new methodology was developed at that time.[8] The energy price tables contain several possible payment streams, all based on the assumption that fuel costs would rise over the term of the contracts. PG&E did not seek administrative review by filing an application for rehearing of the adoption of these tables in D.83-09-054.

The assumption of constantly rising fuel costs, on which D.83-09-054 prices were based, proved incorrect. These costs diverged from forecasts, making the agreed-on prices more and more favorable to QFs, until the Commission suspended the availability of interim SO4 to new QFs.[9] The suspensions did not affect the validity of interim SO4 contracts already signed at the time of the suspensions. In the end, SO4 was available only between September 7, 1983 and April 17, 1985.

D.83-09-054 said that the firm capacity price table[10] was to provide price certainty for the term of each contract (up to 30 years) with QFs which committed under interim SO4 to supply

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[7] "The capacity payments are determined and paid under the same terms as those in existing Standard Offers #1 and #2, for as-available and firm capacity, respectively." D.83-09-054, App. B to Petition, p. A-22. The methodology for developing capacity payments under SO2 was adopted in D.82-01-103, as modified in D.82-04-071 and D.82-12-120.

[8] Later, as intended, the Commission held months of evidentiary hearings to resolve issues surrounding the development of the final version of SO4, including a methodology for determining avoided cost in the long term.

[9] D.85-04-075 (April 17, 1985; App. E to Petition) suspended SO4's availability for all utilities and all payment options; previous decisions beginning with 84-10-098 (October 17, 1984) had ordered partial suspensions.

[10] PG&E's interim SO4 (Appendix K to Petition), the only interim SO4 at issue here, lists these prices in Table E-2 (firm capacity). PG&E's Table B-1 lists energy prices and Table D-2 as-available capacity prices. We will refer to the tables with PG&E's designations.

firm capacity, and which met the requirement that they begin delivering energy within 5 years of signing the contract. Because interim SO4 was not suspended until April, 1985, QFs which signed as late as that under the interim offer have until April, 1990 to begin deliveries. But the unmodified Table E-2 had firm capacity availability dates filled in only to 1987, leaving QFs which planned to begin operations later than that without the price certainty which was "the crux of interim Standard Offer 4." (D.86-10-038, App. F to Petition, at A-129.) The problem is much the same for Tables B-1 and D-2 (See Appendix K to Petition.), except that the agreement of the parties, ratified in D.83-09-054, intended price certainty for up to ten years for energy and as-available capacity.

C. Procedural Background to the Present Petition

In August, 1986, three QFs filed petitions for modification of D.83-09-054, asking the Commission to clarify the issue of Table E-2's extension, because PG&E refused to complete its tables through 1990 as the other California electric utilities had done. The QFs argued that the extension was implicit in their contracts, ministerial in nature, and required no evidentiary hearings. PG&E argued that QFs without the full term of price certainty originally built into the agreement ought to be paid "a reasonable price at the time of delivery," "by analogy to the Uniform Commercial Code as adopted in California" (D.86-10-038, App. A to Petition, p. 7.), rather than the price calculated at the time interim SO4 was developed, as provided in the FERC regulations, 18 CFR § 292.304(d) (2).

As PG&E concedes, the Commission has consistently refused to make retroactive changes to interim SO4, except in certain narrow circumstances not relevant here. (See D.83-09-054, App. B to Petition, ordering paragraph 1, pp. A-44-A-45.) Accordingly, the Commission refused to allow PG&E to change the terms of interim SO4 merely because conditions had changed since the adoption of the interim offer. In D.86-10-038 the Commission agreed with the petitioning QFs "that the extension is ministerial, given that we specified the appropriate discount rate in D.83-09-054, and the combustion turbine cost escalation factors are

already implicit in Table E-2." (D.86-10-038, App. F to Petition, p. A-134.)[11]

There, as here, PG&E argued that to complete Table E-2 would be to reform the contract retroactively, but the Commission said that "this theory collapses because we are *not* supplying missing terms but rather construing the express terms to give them clear and logical effect." (*Id.*, A-135.) The Commission found, among other things, that:

> 3. Interim Standard Offer 4 is the result of a negotiating conference at which the parties agreed on a series of energy and capacity price schedules. *The purpose of the schedules is to provide a contract with price certainty equal to or greater than that provided to QFs under Standard Offers 1, 2, and 3.*
>
> 4. The intent of Table E-2, and other provisions in interim Standard Offer 4 regarding firm capacity QFs, is to establish a payment schedule for firm capacity calculated for the term of the contract at the time the contractual obligation is incurred. This treatment of firm capacity pricing is identical to one of the payment options available to firm capacity QFs under Standard Offer 2.
>
> 5. Extension of Table E-2, as requested by petitioners, is essentially ministerial.

Id., p. A-137 [emphasis added].

Accordingly, the Commission ordered that PG&E complete its Table E-2 to include the years 1988 through 1990. However, D.86-10-038 provided that the ordered escalation of Table E-2 prices according to its original methodology should be limited to those QFs with firm capacity availability dates (erroneously called "on-line dates" in the order) during those three years, and

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[11] The Commission noted "that PG&E itself (in a petition for modification of D.83-12-068) has argued that extension of a firm capacity price schedule for purposes of Standard Offer 2 constitutes a 'ministerial act.' Not surprisingly, PG&E has asked to withdraw that petition. We have not as yet ruled . . . as the petition was filed in another proceeding (A.82-12-48)." (D.86-10-038, App. F to Petition, fn. 11.)

that "QFs who come on-line later than the date specified in their contracts but consistent with the five-year deadline should retain their original firm capacity payment schedule but are not entitled to escalation." (D.86-10-038, App. F. to Petition, p. A-138.)

Applications for rehearing of D.86-10-038 followed, asking the Commission (1) to clarify its erroneous use, in D.86-10-038, of the term "on-line date" to refer to the date determining the firm capacity price; and (2) to clarify "what should be done about prices that appear to come within the 'fixed price period'[12] of a given QF but that presently do not have prices indicated in the relevant payment schedules [Tables B-1 and D-2] in PG&E's interim SO4." (D.86-12-013, App. G to Petition, p. A-142.)

The Commission chose to address only the first issue in D.86-12-013, and to devote more time and consideration to the second issue for decision at a later date. D.86-12-013 confirmed that the intent of the parties had always been to use the firm capacity availability date as the determining date for the firm capacity prices under Table E-2 (which itself specifies "Firm Capacity Availability Date" as the operative date. App. K to Petition, page A-238.), and that the Commission's inappropriate use of the term "on-line date" had been unintentional.

The second issue, that of the completion and escalation of Tables B-1 and D-2, was considered in D.86-12-104. The Commission modified D.86-10-038 to extend them, finding that price certainty was intended for these tables as well as for E-2, and that without the extension, many QFs would not receive the full "fixed price period" of up to ten years intended under interim SO4. (See footnote 12, above.) The Commission declined to escalate prices

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[12] "*Fixed price period*—The period during which forecasted or levelized energy prices, and/or forecasted *as-delivered capacity* prices, are in effect; defined as . . . the first ten years of the *term of agreement* if the *term of agreement* is anywhere from 20 through 30 years." App. K to Petition, p. A-197 (emphasis in original). It is difficult, in the face of this language, to see how PG&E can argue in good faith that it did *not* intend to assure ten years of price certainty for energy and as-available capacity for QFs with long-term contracts.

in these tables in the extended years, however, distinguishing them from Table E-2 as follows:

> [Table E-2] is merely an expression of the values of the agreed-upon price proxy, the cost of a combustion turbine (CT), carried over all applicable years. The change due to escalation was thereby made ministerial. Tables B-1 and D-2, on the other hand, are based on negotiations between the parties, which cannot be replaced without long and complex hearings for the sole purpose of adopting a workable methodology. Such hearings for the purpose of determining the increment or decrement for three years' worth of pricing would be of far more cost than benefit to all concerned.
>
> . . .
>
> The simplest method of completing the ten years of price certainty is to carry the last value, that of 1997, forward over the next three years. This method at least provides price certainty and sets the price at the last negotiated price level; if the price is too high or low, then the harm suffered by either the utility or the QFs will thus be minimized.

(D.86-12-104, App. H to Petition, pp. A-146-A-147.) The Commission went on to note that there had been some changes in the Tables already negotiated between the utilities and the QFs, but made it clear that the decision was not meant to affect such agreements, and declined to discuss them further, saying,

> We think it is clear that everyone's efforts are best put to use in this proceeding on refinements to resource planning, capacity valuation, and updating for *prospective* application to QF/utility transactions. It is not the business of this Commission or the utilities to adjust for current perceptions of oversupply by harsh dealing toward QFs already under contract.

(*Id.*, App. H to Petition, p. A-147, emphasis in original.) The Commission's refusal to grant PG&E such a retroactive adjustment of its interim SO4 contracts was consistent with prior decisions. Having failed to convince the California Supreme Court, PG&E now seeks to convince this Court that the contract

problem presented is a federal question involving the interpretation of PURPA.

II
ARGUMENT

A. The decisions below raise no federal issue under PURPA because they interpreted not PURPA but standard contracts negotiated and approved more than three years earlier as in compliance with the Act.

PG&E bases its jurisdictional claim on Title 28, United States Code § 1257, subdivision (3). PG&E argues that the case presents a federal issue regarding the interpretation of PURPA, saying that the Commission is attempting to require PG&E to pay QFs more than PURPA authorizes for energy and capacity. In fact, the prices at issue were negotiated by PG&E in 1983 and adopted by the Commission in that year without challenge by PG&E. The decisions to which PG&E now objects were mere interpretations necessary to correct a gap in the contracts. This case presents no federal issue and therefore is inappropriate for certiorari.

The crux of interim SO4 is to assure price certainty to QFs, with prices set according to the year in which each QF starts operating. However, the price tables originally appended to the offer were not filled in for three of the years needed to accord some QFs the full period of price certainty stated in the offer. The decisions of which PG&E now seeks review corrected this ministerial error, and did not in any way alter the basic contracts which PG&E negotiated in 1983, and which PG&E now, for the first time, claims to be in violation of PURPA.

The Commission decisions at issue did not interpret PURPA; that interpretation was made in 1983 in D.83-05-038 and D.83-09-054. The three decisions attacked in the Petition merely interpreted the contracts adopted by the 1983 decisions and corrected ministerial errors.

PG&E argues that the latest decisions set "new" prices exceeding avoided cost under PURPA and without any evidentiary

hearings. There were no hearings for the correction of errors, first, because the contract in question was *interim* SO4, the offer intended to implement PURPA temporarily so as to permit the parties to hold the extensive hearings necessary to determine avoided cost with the greatest possible precision; and, second, because the errors were minor and correctible, according to a mathematical formula in Table E-1 and on a minimal-harm basis for Tables B-1 and D-2.

The extension of these tables did not constitute adoption of "new" prices, because the tables prior to the corrections did not contain any prices at all for QFs with firm capacity availability dates falling within the last three years of interim SO4's availability. Under PG&E's logic, any payments for energy or capacity during those years would be "new" prices; the only way to avoid "changing" the original contract would be for the QFs to produce electricity and deliver it to PG&E without any payment at all.

Since the prices are not "new," but mere extensions of the prices negotiated by PG&E itself in 1983, it was unnecessary either to interpret PURPA or to hold hearings to determine avoided cost to extend the tables. The decisions interpreted no more than PG&E's interim SO4 contract in the light of the intent of the parties at the time the contract was negotiated and approved. PURPA was therefore not involved in these decisions, and its interpretation is irrelevant to them. Because PG&E's entire jurisdictional argument is based on the premise that the interpretation of § 210 of PURPA has been drawn in question, and because it is clear that PURPA is not involved, it is also clear that the requirements of 28 U.S.C. § 1257 are not satisfied, and that this case is not an appropriate one for granting of a writ of certiorari.

B. The decisions below raise no federal issue under PURPA because, even if avoided cost under PURPA were an issue in this matter, the prices in question were set to equal avoided cost.

PG&E argues that the prices for energy and capacity under its interim SO4 contract exceed avoided cost and therefore violate PURPA. This is untrue; D.83-09-054 set payment schedules for

firm capacity, as-available capacity, and energy to be equal to avoided cost as calculated at the time the obligation was entered into by PG&E. This action was well within the authority granted to the Commission under PURPA and the FERC rules. (See 18 C.F.R. § 292.304 (d) (2).) The fact that PG&E's *current* projections of avoided cost makes prices set in 1983 seem high cannot retroactively affect those calculations.[13]

PG&E's arguments concerning avoided cost are nonsensical. The FERC Rules and case law establish that avoided cost is the lowest permissible price for QF power. (See footnote 2, above.) If PG&E's interpretation of PURPA and the Rules were correct, and avoided cost were also the ceiling price (Petition, pp. 15-16), the Commission could set no price at all that was not *exactly* equal to avoided cost, as calculated not only at the time the contract is entered into but also at any point during the life of a 30-year contract. This result is illogical, as the exact *current* value of avoided cost necessarily shifts in response to volatile fuel prices. It is possible that, by the end of the term of the interim SO4 contracts in question, the prices at issue will be equal to, or lower than, the long-run avoided cost considered over the life of the contracts.

Yet even if PG&E's interpretation were correct, it would be beside the point, because the Commission in D.83-09-054 set prices to equal avoided cost as calculated at the time interim SO4 was created, as determined and agreed to by *all* parties, including PG&E, according to their best projections. (See discussion of the history of interim SO4, above.)

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[13] PG&E's dire predictions of billion-dollar excess payments are based on nothing more than projections, just as the prices now at issue were based on projections PG&E made in 1983. There is no way to be certain that oil prices will remain as low as they are now for the duration of the contracts in question. It is still conceivable that, before QF contracts under interim SO4 have run their terms, the prices will again be as advantageous to PG&E as they were when PG&E negotiated them in 1983.

C. The decisions below raise no federal issue under PURPA because, even if the Commission's 1983 decisions had set prices above avoided cost, PG&E is precluded by statute and caselaw from collateral attack at this late date.

Even if there were a federal PURPA issue involved, PG&E is precluded from making that argument now because it failed to raise the issue in a timely manner.

It is clear that PG&E accepted the Commission's authority to set avoided cost by the methodology of D.83-05-038 and with the contracts approved in D.83-09-054. Otherwise, PG&E would have challenged those decisions by applying for rehearing, and, if denied, petitioning the California Supreme Court for review before bringing the matter to this Court. (See footnote 5, above.) It did not do so, because the decisions were well within the Commission's authority, and because, at the time, the prices set were in accord with PG&E's own projections of avoided cost.

California Public Utilities Code § 1709 provides that, "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." Cal. Pub. Util. Code § 1709; *Sale v. Railroad Commission* (1940) 15 Cal.2d 612, 616; *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 630, *appeal dismissed* 348 U.S. 859, 860 (1954); *Napa Valley Electric Co. v. Railroad Commission* (1920) 251 U.S. 366, 371-373; *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1289-1291 (9th Cir. 1983), *cert. denied*, 444 S.Ct. 1908 (1984).

Thus, D.83-05-038 and D.83-09-054 have become final on the issue of the price tables which PG&E contests here, and their findings of fact and conclusions of law have become conclusive, through the failure of any party to challenge them within the time provided by the statutes. Therefore, even if PG&E were to challenge those decisions directly now, the conclusiveness of the findings and conclusions which support them would preclude any relief through review in the courts. The Commission pointed out PG&E's lateness in its arguments before the California Supreme Court, which denied PG&E's petition. Such a denial, even without opinion, acts as a decision on the merits, both as to the law

and the facts presented in the review proceedings, under the rule of *People v. Western Air Lines* (1954) 42 Cal.2d 621, *appeal dismissed* 348 U.S. 859.

CONCLUSION

PG&E negotiated its interim SO4 in 1983 under PURPA's requirements and under this Commission's direction. At the time, the parties intended to provide price certainty for the full term of the contract for firm capacity, and up to ten years of price certainty for energy and as-available capacity. The prices, based on long-term value to the utilities of the capacity and energy bargained for, were negotiated by the parties, including PG&E, on the assumption, among other things, of constantly rising fuel costs over the term of the contracts.

Since the adoption of the contracts, fuel prices have plummeted and the prices in interim SO4 are no longer as attractive to PG&E as they were in 1983, when PG&E negotiated them and the Commission approved them. PG&E has asked the Commission and the California Supreme Court for retroactive reformation of the contracts, and its requests have been denied. PG&E now asks this Court to review the Commission's refusal to make such retroactive changes.

The Commission is completely within its authority to continue to refuse to make these changes. The evidence plainly shows that the Commission's decisions interpreting PURPA were made in 1983, without challenge by PG&E; that the 1983 decisions were made in full compliance with PURPA and the FERC rules; and that the decisions now appealed from did no more than interpret the interim SO4 contracts approved more than three years earlier. There is no federal issue involved in this matter, and, had there been one, it would have been precluded by PG&E's failure to make timely appeal. Therefore, certiorari is inappropriate, and the petition should be denied.

Respectfully submitted,

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Appendix A

Decision 83-05-038 May 4, 1983

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application 82-04-44
(Filed April 21, 1982)
Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2.

Application 82-04-46
(Filed April 21, 1982)
In the Matter of the Application of Southern California Edison Company for an Order by the California Public Utilities Commission Directing Edison to Purchase Power from Qualifying Facilities Based on a Standard Offer for Firm Capacity and Energy Based on Long-Run Marginal Costs (OIR-2).

Application 82-04-47
(Filed April 21, 1982)
In the Matter of the Application of San Diego Gas & Electric Company for an Order by the California Public Utilities Commission Directing SDG&E to Purchase Power from Qualifying Facilities Based on Standard Offers and to Make Certain Changes or Additions to its Tariff Affecting Purchases from Qualifying Facilities.

INTERIM OPINION ON PROCEDURAL GUIDELINES

Introduction

The purpose of this decision is to establish a procedure to help resolve issues surrounding the "long-term resource plan based offer" (Standard Offer No. 5) ordered by the Commission in Decision (D.) 82-01-103, Order Instituting Rulemaking (OIR) 2, (January 21, 1982).

D.82-01-103 established comprehensive guidelines for sales of electricity from small power producers to utilities. The utilities were ordered to file five standard offers, each with different terms and conditions. The first four offers were all derived from short-run avoided cost methodologies that are conceptionally well understood, even though many difficult details needed to be worked out in compliance hearings.

The conceptual approach for development of the offer was not established for the long-run resource plan offer, and D.82-01-103 ordered utilities to make proposals for our review. After reviewing those offers, it became clear that evidentiary compliance hearings would lead to protracted conceptual cross-examination on how to pay small power producers entering long-term contracts for their value in deferring new utility capacity. Rather than starting with the utility proposals, we decided it would be preferable to define the alternatives, present some tentative proposals, and receive comments from parties. With this approach, parties' general positions could be better understood, and we hoped to establish a framework before going into detailed compliance hearings on specific utility offers filed within that framework.

So, we issued on November 18, 1982 a *Report and Request for Comments* (Report) which presented issues relating to Standard Offer No. 5 and tentatively proposed a framework for such an offer. The Report concluded that an interim offer should be based on a five-year forecast of utility projected short-run marginal costs, followed by prices in future years based on the energy and capacity costs of a new coal plant. The Report also proposed that payments escalate over the life of the contract to avoid complex termination requirements and that the small power producer

should be given flexibility about the output commitment it will take for future years. We asked parties to comment.

Responses by Parties to Commission Report

By January 31, 1983 the Commission received comments on the Report from 18 interested parties addressing both substantive and procedural issues. The comments were uniformly helpful. The comments included constructive criticisms of the Report and imaginative alternative frameworks for a long-run offer. The Commission was presented good informatioin on how to achieve a workable and useful long-term offer.

Most importantly, the comments indicated a broad consensus about the need to achieve the underlying purpose of the Standard Offer No. 5 which is to provide greater price certainty and to value the small power producers' facilities consistently with utility resources. Pacific Gas and Electric Company (PG&E), for example, while disagreeing with much in the Commission's Report, strongly endorsed the Report's purpose:

> "It has become apparent that the currently available standard offers do not meet the needs of all QFs. One of the major reasons for this is the high degree of future price uncertainty in these offers which adversely affects the ability of some projects to obtain financing.
>
> . . . A well designed standard offer, which mitigates the uncertainty, is consistent with avoided cost principles, and balances ratepayer and QF risk would also be desirable." (PG&E comments, page 1.)

PG&E offers a new proposal for a framework to provide greater pricing certainty for small power producers. Similarly, Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) express general accord with the purposes of the Report and make new proposals for a standard offer framework.

Parties representing small power producers also agree that a greater pricing certainty is necessary. Many point out that differ-

ent facilities have different needs and possibly more than one long-term price offer should be available.

In addition to providing useful substantive information, the comments also suggest procedures for resolving this matter. There was significant difference of opinion among parties on procedure.

In our Report, we tentatively concluded "that resolution of conceptual and policy issues on what methodology is to be selected for the long-term offer does not require factual evidence, but can instead be more effectively decided through written comments and possibly oral presentations." (Commission Report, page 6.) We envisioned the conceptual and policy issues being resolved through a rulemaking-type procedure, while the details of an actual offer would be resolved in subsequent compliance hearings.

PG&E and SDG&E strongly disagree with this procedure. They argue that evidentiary hearings are necessary before the conceptual issues in the standard offer can be resolved. PG&E argues that fairness and due process require that hearings be held. "[I]t would be highly undesirable to resolve these very complex issues without the benefit of evidentiary hearings." SDG&E expresses similar concerns, arguing that the proposed format by the Commission would lead to lengthy compliance hearings and uncertainty about the details of any final order.

SCE also suggests that evidentiary hearings are necessary:

> "Edison believes that these hearings can be handled expeditiously, and without undue delay, if the scope of such hearings is clearly defined. While we certainly agree that the public interest is not served by delay, neither is it served by an incomplete examination of the complex issues surrounding this topic, possibly resulting in the selection of a costing methodology that inaccurately values QF power to utilities and their ratepayers. Edison suggests that, upon receipt and examination of the comments submitted by the various utilities and interested parties, the Commission should submit a 'summary report' which delineates both the various proposals presented and the issues to be examined in an evidentiary hearing."

Many of the other parties commented on procedure. Pacific Energy Resources (Pacific Energy) agreed to hearings. While stating that the Commission report provides a helpful framework, it argues that:

> "[I]ssues raised in this report can be only fully explored by means of hearings before the Commission. At such time each interested party and each utility can present alternative methods of implementing the proposals outlined by the Commission in its report and can present alternative proposals for consideration." (Comments of Pacific Energy, page 10.)

The hearings contemplated by Pacific Energy appear to involve direct presentations to the Commission rather than substantial cross-examination.

Occidental Geothermal, Inc. suggests that "further cooperative exchange of ideas is necessary before QFs can formulate any comprehensive proposal." (Comments of Occidental Geothermal, Inc., page 6.) To that end, it proposes a sequence of workshops, evidentiary hearings on issues relating to project risks, briefs, a decision to order utilities to file an offer, followed by compliance hearings and a decision. Ultrasystems Incorporated also suggests evidentiary hearings on risk-related issues.

California Manufacturers Association basically supports our proposed procedure. It suggests workshops, briefs, followed by a Commission decision, followed by compliance hearings on utility filings. California Independent Energy Producers also supports our proposal.

Natural Resources Defense Council agreed that evidentiary hearings are not necessary, but suggested parties should have the opportunity to comment on other parties' comments. Similarly, the California Energy Commission suggests another round of comments after this Commission issues a more detailed rule.

1. *Procedural Course and Guidelines*

The decision on how to proceed with these consolidated matters is important. We are aware that some QFs are anxious to see this standard offer resolved soon in order to decide whether to

begin projects. Delay on completing this offer could arrest QF development. On the other hand, it is also important to explore these issues to assure that ratepayers' interests are protected.

There are two major alternatives developed by parties. One proposed by utilities would be to hold evidentiary hearings on all of these issues, followed by an order, followed by compliance hearings on utilities' offers. The second general proposal would be the receipt of further written and oral comments, followed by compliance hearings.

Either approach would be overly time consuming and would not necessarily serve the interests of parties. The comments of parties convince us that a long-term standard offer is highly complex, involving avoided cost methodology, performance requirements, and termination penalties. The issues will not be quickly resolved under either procedure. Because of the complexity, we also are not certain that a Commission-ordered standard offer will best meet the needs of parties. It is evident that there are many possible standard offers which could be developed that are consistent with avoided cost pricing principles.

We have decided, therefore, to use a different procedure to resolve this matter before holding any formal evidentiary hearings. We have decided to hold a negotiating conference to give parties an opportunity to work together toward a methodology for an interim long-term standard offer[s]. We noted earlier that there is widespread consensus among parties on the immediate need for the long-term standard offer to provide greater pricing certainty and to reflect the value of QFs in deferring new utility resources. While there are many ideas on how to translate this concept into an offer, we think with the mutual objective of a timely decision in mind, parties can reach an accord.

The negotiating conference, to be held before any formal hearings on the long-term offers, is intended to achieve three things: (1) establish an offer[s] which can be filed by utilities at least on an interim basis which will be supported by the parties; (2) an agreement on a proposal clearly identifying issues, if any, which require further proceedings; and (3) a better understanding by all parties of each other's positions on this complex matter.

This, in turn, will lead to sharper definition of issues for any formal hearings in the future. The Commission, of course, will review and approve any interim offer, and address any proposals for additional proceedings. However, with substantial agreement among parties, we expect to be able to act more expeditiously.

The negotiating conference is a new procedure for the Commission. It should take place in a spirit of cooperation, not of adversarial posturing. Parties should come prepared for an intensive period of education, negotiation, and problem solving. Parties will all benefit by reaching an accord because an interim offer may then be quickly put in place.

We expect the negotiating conference to reach substantial agreement within one month after it commences in the middle of May. We will make as much time available during that month as is necessary for parties to work out an agreement. A tentative schedule for the conference will be presented by the administrative law judge (ALJ) on the first day of the conference. Parties will have an opportunity to review and discuss it. We expect the schedule to permit a thorough presentation of positions on the major issues by parties, followed by analysis, followed by negotiations to settle on an offer. The dynamics of the conference will, of course, depend upon the nature of the issues that need to be discussed.

The negotiating conference will begin on May 23, 1983, and will last not longer than four weeks, with regularly scheduled meetings. Parties should send representatives who can commit extensive time to this process and who can present positions and negotiate. We encourage QFs with similar interests to join and work together. We also encourage parties not only to send technical staff, but also be represented by those who can negotiate and make decisions. The staff will be represented by the Director of the Utilities Division, who will be supported by technical staff and staff counsel.

When the negotiating conference ends, the ALJ will issue a ruling which sets the time in which the three applicant utilities shall amend their applications with new standard offers. After a reasonable time for all parties to review and evaluate the amended

standard offers, we will schedule a prehearing conference to evaluate the need for evidentiary hearings and, if they are required, their scope.

In order to encourage open participation at the negotiating conference, we will order that Rule 50 of our Rules of Practice and Procedure shall apply.[1] That will encourage a free and candid exchange of information, ideas, and alternatives.

2. *Issues for Resolution*

The comments in response to our Report provided many useful suggestions on defining a long-term contract and highlighted the issues that need to be settled. Two broad issues arise. First, what costs are avoided by long-term QF contracts? Second, a related and workable pricing mechanism, with appropriate contract terms and conditions, must be established to pay the QFs for their contribution of providing electricity to avoid those costs. The nature of these payments may vary depending upon the conditions of operation agreed upon by QFs. Generally, the utilities devoted more attention to the first issue of costing, while QFs generally devoted more to the latter issue of pricing.

a. *Costing Methodologies*

The utilities generally support use of projected short-run avoided costs (i.e., marginal running costs plus shortage value) for use in defining a long-run offer. Utilities assert that the criteria for determining whether a utility would add a new resource depends on whether the capital and operating costs of the proposed resource is less than the projected short-run avoided cost. Resources are added until the two are equal according to the rule of economic dispatch.

We agree that methodologies using projected short-run avoided costs and using the costs of new resources should produce the

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[1] Rule 50 provides as follows: "(Rule 50) Facts Disclosed Privileged. Facts disclosed in prehearing conferences are privileged. Except by agreement, they shall not be used against participating parties, before the Commission or elsewhere, unless proved by evidence other than that employed in disclosing such facts."

same results in theory. However, the problem is translating projected costs into QF prices. The utilities contend that the short-run methodology can be used. The Commission's Report found that a coal plant would be a simpler proxy. Other parties expressed mixed views on the issue.

We expect this issue to be developed fully in the negotiating conference. Parties should have the opportunity to demonstrate clearly how to derive avoided cost numbers from their marginal cost methodology. A major criteria for consideration will be workability as well as theoretical validity. We are looking for *results*. We expect the negotiating conference to develop a consensus methodology that fairly reflects the long-term value of QF power that can be readily implemented through pricing.

b. *Pricing*

It is apparent from the comments that developing an avoided cost estimate represents only part of the problem of developing a standard offer. Equally difficult is translating those costs into a contract with prices, terms, and conditions.

QFs have different views on what the contracts should be like. Some QF representatives, particularly those with cogeneration facilities, are interested in fixing incremental heat rates in a contract, but not fixing total fuel prices, since a cogenerator's fuel price may fluctuate with the rates of serving gas utilities. Others would like more pricing certainty, including in some cases, levelized payments. Another area of difference involves performance requirements. Some QFs can produce reliably based on very stringent performance standards, others produce intermittently and seek a more flexible standard.

These differences explain why QFs want an array of standard offers; however, we must caution the parties that trying to devise a number of standard offers to accommodate all QF situations—and which do not result in favoring some QF technologies over others—will result in tremendous complexity and, of course, attendant delay.

We welcome some variety of long-term offer options, but we stress that all variations must be consistent with avoided cost

principles. If levelized payments are proposed, for all or part of the contract term, we expect corresponding proposals to mitigate potential loss to the ratepayer resulting form nonperformance or overpayment.

c. *Resolution of Issues Resulting From the Negotiating Conference*

We expect that most of the issues can be resolved in the negotiating conference to permit an agreement on an offer that utilities should file on an interim basis. The agreement should include both a conceptual framework and a means of deriving specific prices. We do not expect that parties will waive their rights to further proceedings in this matter. The long-term offer methodology is evolving, and it may be useful to further analyze the question later. Therefore, in addition to a standard long-term offer, we solicit a consensus from parties on a procedure for further analysis of the long-term offers.

All parties should come to the negotiating conference with the list of issues which they see needing to be resolved, and should be prepared with proposals for resolution of issues. Staff will prepare and submit a comprehensive listing based on the comments for review already filed by parties. We expect the proposals to be offered with a spirit of compromise. Everyone will have the opportunity to present their proposals at the negotiating conference and make suggestions for improvements of other proposals.

INTERIM ORDER

IT IS ORDERED that:

1. A negotiating conference to be presided over by ALJ Alderson shall be held on May 23, 1983, at 9:30 a.m. at Hastings College of the Law, 198 McAllister Street, Room K, San Francisco. This conference shall continue over a four-week period, with the schedule to be set by the ALJ. It will not be reported by the Commission's Reporter, and the use of material disclosed during the conference will be governed by Rule 50 of the Commission's Rules of Practice and Procedure.

2. After the negotiating conference ends, the ALJ shall issue a ruling providing a time limit within which the applicants shall amend their applications with revised standard offers. Thereafter, a prehearing conference shall be scheduled to assess the need for hearings and define their scope.

3. This order shall also be served on the applicants and the parties served with D.82-12-120 in Application 82-03-26 et al.

This order is effective today.

Dated May 4, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
DONALD VIAL
Commissioners

I abstain.
/s/ PRISCILLA C. GREW
Commissioner